MOTION FILED
APR 6 - 2007

(4)

No. 06-1209

In The
Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

versus

WILLIAM TERRY, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION OF *AMICUS CURIAE* CORNELL LAW SCHOOL DEATH PENALTY PROJECT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

SHERI LYNN JOHNSON
CORNELL LAW SCHOOL
108 Myron Taylor Hall
Ithaca, NY 14853-4901
(607) 255-6478
slj8@cornell.edu

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Cornell Death Penalty Project (hereinafter "the Project") respectfully moves this Court, pursuant to Rule 37.2(b) of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae*, in support of the Petition for Writ of Certiorari, No. 01-1209, to the United States Court of Appeals for the Eleventh Circuit. Petitioner, John Washington Hightower, has consented to the filing of this brief. Respondent has declined to consent.

The instant petition centers on the correct application of this Court's precedent in *Batson v. Kentucky*, 476 U.S. 79 (1986), as further clarified in *Miller-El v. Dretke*, 545 U.S. 231 (2005). Mr. Hightower, a death sentenced habeas petitioner, was prosecuted at trial by a state district attorney with a documented history of racial discrimination in the jury selection process (*see Amadeo v. Zant*, 486 U.S. 214, 228 (1988)). Petitioner has presented, in detail, the argument that this prosecutor violated *Batson*, that the lower court ignored this Court's decision in *Miller-El,* and the conflict among circuit and state courts in applying this Court's precedent. Rather than mirroring Petitioner's arguments, *Amicus Curiae*, the Project, intend to include arguments and authority dealing with policy and fundamental fairness concerns in death penalty cases.

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. Since its inception, the Project has had a particular interest in the influence of racial discrimination

on the imposition of the death penalty. The Project's approach to these questions of basic fairness, including questions of racial fairness, is informed to the greatest extent possible by reliance on empirical studies of, and relevant to, the capital sentencing process. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting important questions of law on which its expertise and experience may be useful to this Court. Mr. Hightower's case presents just such an important question.

For the above reasons, we respectfully request that the Court grant this motion for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

SHERI LYNN JOHNSON
CORNELL LAW SCHOOL
118 Myron Taylor Hall
Ithaca, NY 14853-4901

Attorney for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	1
I. Introduction and Summary of Argument	1
II. The Eleventh Circuit Defied This Court's Order	3
III. *Miller-El II* Compels the Conclusion That the Reasons Given By Mr. Hightower's Prosecutor Were Pretextual	10
IV. This Case Is "On All Fours" With *Miller-El II* In Its Pernicious Use of Racial Stereotypes	13
V. Race-Based Recalcitrance Demands Rebuke and Correction By This Court	16
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Amadeo v. Zant, 486 U.S. 214 (1988) 1, 8

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Brown v. Board of Education, 347 U.S. 483 (1954) 17

Burden v. Zant, 510 U.S. 132 (1994) 18

Burden v. Zant, 24 F.3d 1298 (11th Cir. 1994) 18

Cooper v. Aaron, 358 U.S. 1 (1958) 18

Hightower v. Schofield, 545 U.S. 1124 (2005) 4

Hightower v. Schofield, 365 F.3d 1008 (11th Cir. 2004) ...5, 6, 7

Hightower v. Terry, 459 F.3d 1067 (11th Cir. 2006) ..... *passim*

Miller-El v. Cockrell, 537 U.S. 232 (2003) ..... *passim*

Miller-El v. Dretke, 545 U.S. 213 (2005) ..... *passim*

Snyder v. Louisiana, 942 So. 2d 484 (La. 2006) 2, 17

BOOKS, ARTICLES & TREATISES

Alexander Aleinikiff, *The Constitution in Context: The Continuing Significance of Race*, 63 COLO. L. REV. 325, 332 (1992) 14

Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739, 1751-53 14

Gilovich, Keltner, & Nisbett, *SOCIAL PSYCHOLOGY* 454 (W.W. Norton & Co. 2006) 15

TABLE OF AUTHORITIES – Continued

Page

OTHER

Petition for Certiorari, *Snyder v. Louisiana* (2007) (No. 06-10119) 2, 17

INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. Since its inception, the Project has had a particular interest in the influence of racial discrimination on the imposition of the death penalty. The Project's approach to these questions of basic fairness, including questions of racial fairness, is informed to the greatest extent possible by reliance on empirical studies of, and relevant to, the capital sentencing process. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting important questions of law on which its expertise and experience may be useful to this Court.[1]

ARGUMENT

I. Introduction and Summary of Argument

Racially tinged recalcitrance now confronts this Court in the lower courts' response to its *Miller-El v. Dretke*, 545 U.S. 231 (2005) (hereinafter *Miller-El II*), remands. This Court's opinion in *Miller-El v. Cockrell*, 537 U.S. 322 (2002) (hereinafter *Miller-El I*), provided a quite detailed guide to the proper analysis of claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), which forbids racial discrimination in a prosecutor's exercise of the peremptory

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae* and its associated faculty made a monetary contribution to the preparation or submission of the brief in support of the petition.

challenge. This Court granted certiorari to review the Fifth Circuit's determination that Miller-El's *Batson* claim was so weak that its denial in the district court was not entitled to a certificate of appealability. This Court reversed and remanded, finding that Miller-El was entitled to that review because the correctness of the district court's decision was one upon which reasonable jurists could disagree; it also laid out specific facts and principles that the Fifth Circuit should consider on remand.

Instead, the Fifth Circuit gave short shrift to this Court's careful *Miller-El I* opinion, and affirmed the denial of Miller-El's *Batson* claim. This Court granted certiorari again, reiterated and elaborated upon its *Miller-El I* opinion, and once more reversed and remanded. *Miller-El II*, 545 U.S. 231. The subsequent history of the other *Miller-El* remands demonstrates that the necessity of a double remand for correct adjudication of Miller-El's claim was not a fluke. This Court has reversed and remanded three other cases in light of *Miller-El II*; of the two that have been decided to date, both reaffirm their prior decisions. In the first, now before this Court on a second petition for certiorari, *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), the lower federal court defiantly held that *Miller-El II* is inapplicable and reinstated its prior opinion; in the second, *Snyder v. Louisiana*, 942 So. 2d 484 (La. 2006), also presently before this Court on a second petition for certiorari, the lower court purported to follow this Court's remand order, and more quietly, but still obdurately, deviated from the principles laid down in *Miller-El II*. *See* Petition for Certiorari, *Snyder v. Louisiana* (2007) (No. 06-10119).

Dissenting, Judge Wilson characterized the majority's decision in *Hightower* as "violat[ing] th[is] Court's express mandate." 459 F.3d 1067 (11th Cir. 2006) (Wilson, J.,

dissenting). That characterization is accurate, for the lower court's excuse for refusing to apply the comparative juror analysis *Miller-El II* commands is one directly addressed and unambiguously rejected by this Court in *Miller-El II*. Moreover, because the two pretextual reasons proffered by Miller-El's prosecutor were the *same* two reasons proffered by Mr. Hightower's prosecutor, "[t]his case is factually on all fours with Miller-El," *id.* at 1077 (Wilson, J., dissenting). Consequently, the Eleventh Circuit's refusal to follow this Court's directive to reconsider in light of *Miller-El II* is particularly egregious. Finally, both of the prosecutor's pretextual reasons for the strikes – purported links to criminality and opposition to the death penalty – call upon stereotypes of African Americans, rendering their use especially pernicious.

II. The Eleventh Circuit Defied This Court's Order.

The Eleventh Circuit's justification for refusing to reconsider in light of *Miller-El II* was itself pretextual. The procedural history of *Hightower v. Terry*, standing alone, points toward recalcitrance. When considered with the facts underlying Hightower's claim, the Eleventh Circuit's decision "correlates with no fact as well" as with defiance. *Cf. Miller-El II*, 545 U.S. at 266 ("The strikes correlate with no fact as well as they correlate with race . . . ").

As set out in Mr. Hightower's petition for writ of certiorari, his prosecutor had used six of his seven strikes on African American jurors. In November, 2003, before this Court had decided *Miller-El II*, Mr. Hightower filed a petition for writ of certiorari posing the question: "Whether the Eleventh Circuit improperly affirmed the Georgia courts' failure to conduct a complete three-prong

analysis as required by *Batson v. Kentucky*, 476 U.S. 79 (1986), in evaluating Petitioner's claim that the prosecution purposefully excluded African-Americans from petitioner's capital jury in violation of the Sixth and Fourteenth Amendments." In support of his petition, Mr. Hightower argued that "the Eleventh Circuit had failed to apply the third prong of the *Batson* analysis as established by this Court . . . " and had deferred to state court decisions that "made no effort to determine whether [the prosecutor] exercised his peremptory strikes in a discriminatory manner to strike prospective black jurors, instead accepting [his] proffered race-neutral reasons without further inquiry." Appendix J, A47-A49. The petition went on to argue that courts reviewing *Batson* claims must consider all relevant circumstances, including the "attributes of a stricken black juror with those of seated white jurors." It complained that neither the trial court nor the Georgia Supreme Court had compared the attributes of struck black jurors with those of seated white jurors, and then presented a comparative juror analysis arguing that the prosecutor's stated reasons for his strikes were pretextual.

On June 13, 2005, this Court decided *Miller-El II*, and a week later, granted the petition for writ of certiorari in *Hightower v. Schofield*. It vacated the decision of the Eleventh Circuit and remanded the case "for further consideration in light *Miller-El v. Dretke*, 545 U.S. 231 (2005)." *Hightower v. Schofield*, 545 U.S. 1124 (2005). After rebriefing, a divided panel of the Eleventh Circuit declared that "*Miller-El* does not control our decision" and that "our opinion in *Hightower v. Schofield* is accordingly reinstated." *Hightower v. Terry*, 459 F.3d 1067, 1069, 1072 (11th Cir. 2006) (Appendix A).

Even a cursory examination of the Eleventh Circuit's purported reasons for rejecting the remand instructions reveals insubordination, or, at the very least, indifference to this Court's commands. According to the majority, *Miller-El II* was inapposite because of "how *Miller El* reached the Supreme Court and how *Hightower v. Schofield* came to us." *Id.* at 1069. The difference, wrote the majority, was that *Miller-El II* relied upon evidence that had been developed in federal habeas corpus proceedings, while *Hightower* was "limited to the evidentiary record developed in state court during jury selection and the trial court's ruling, Hightower's and the state's briefs to the Supreme Court of Georgia (with respect to the Batson claim), and that court's opinion (again, with respect to the *Batson* claim)." *Id.* at 1070.

Again according to the majority, the *Hightower* record from state court did not support a grant of relief for three reasons. Most importantly, because Hightower's brief on direct appeal to the Georgia Supreme Court did not expressly argue that a comparison of struck black jurors with seated white jurors revealed discrimination, "if Hightower wants the federal courts to entertain an argument he could have made in the Georgia Supreme Court but did not, he must establish cause for his counsel's failure to present the argument and resulting prejudice [which he has not done]." *Id.* (citation omitted). Second, the majority insisted that "Hightower never provided the [state trial] court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors." *Id.*, 459 F.3d at 1071 (quoting *Hightower I*, 654 F.3d at 1035). Third, the majority wrote that the trial judge's *silence* on whether Briley's stated reasons for strikes were credible, reflected that the trial

court "implicitly *found* the prosecutor's race neutral explanations to be credible, thereby completing step three of the *Batson* inquiry," a finding to which the federal court should, and did defer. *Hightower II*, 459 F.3d at 1072, n.9 (emphasis added).

None of the Eleventh Circuit's conclusions are consistent with a good faith application of *Miller-El II*. Its initial distinction between "how *Miller-El* reached the Supreme Court and how *Hightower v. Schofield* came to us," *id.* at 1069, is irrelevant, given this Court's explicit language in *Miller-El II* addressing the information that reviewing courts must consider in evaluating *Batson* claims. The Eleventh Circuit's position that Mr. Hightower's comparative juror analysis could not be considered by a federal court (except in the guise of an ineffective assistance of counsel claim) because he did not present it to the state court is flatly inconsistent with footnote two in *Miller-El II*. 545 U.S. at 241 n.2.

Footnote two of the Court's opinion in *Miller-El II* first reports the contention of the dissenters that comparisons of black and white prospective jurors (as well as arguments about disparate questioning of black and white jurors and the use of the jury shuffle) were not before the Court because they had not been "put before the Texas courts." *Id.* at 241 n.2 (quoting *id.* at 279 (Thomas, J., dissenting)). The Court then rejects that contention, holding that this argument "conflates the difference between evidence that must be presented to the state courts to be considered in habeas proceedings and theories about that evidence." *Id.* The Court opinion is both specific and explicit on this point: "There can be no question that the transcript of voir dire recording the evidence on which Miller-El bases his arguments and on which we base our

result, was before the state courts, nor does the dissent contend that Miller-El did not 'fairly presen[t]' his Batson claim to the state courts." *Id.* at 241 n.2. Moreover, the footnote then distinguishes between the jury shuffle, the disparate questioning, and the comparative juror analysis on the one hand, and the juror questionnaires and information cards on the other, stating that only with respect to the latter was there a question about what was before the state courts. Because a majority of this Court unambiguously rejected the dissent's position, that position cannot legitimately be interposed between this Court's remand "for further consideration in light *Miller-El v. Dretke*" and the Eleventh Circuit's obligation to reconsider its prior decision.

Thus, the Eleventh Circuit had no excuse for deeming *Miller-El II* inapplicable, and no excuse for not considering the merits of Mr. Hightower's comparative juror analysis. Moreover, *Miller-EL II* also disposes of the panel majority's assertion that Mr. Hightower failed to provided the state court with "any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors." *Id.*, 459 F.3d at 1071 (quoting *Hightower I v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004)). According to the majority,"[t]he only evidence Hightower attempted to present to the trial court in support of his *Batson* objection came in the form of a newspaper article [about the Supreme Court argument in *Amadeo* which] the trial court excluded . . . We are bound by that ruling and, as such, we do not consider that article as part of the record before the Georgia courts for the purposes of our review under § 2254(d)." *Hightower II*, 459 F.3d at 1071. But the excluded newspaper article was only

half of the story. After making his *Batson* motion, defense counsel stated:

> . . . Mr. Briley has in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels . . . Your Honor, I have here a copy of the Fulton Daily Reporter which was on Wednesday, March 30, 1998, where we got headlines, Does County Plan to Discriminate, high court hears jury panel. This was regarding the case of the *State vs. Amadeo* which has gone up to the [] Supreme Court.[2] I will make a quote here from the U.S. Supreme Court I will make a quote here from the U.S. Supreme Court Justice John Paul Stevens. "The evidence disclosed is the intentional program of rigging the jury by the prosecutor's office." *This arose out of a memo which has been attributed to Mr. Briley stating that there was a purpose and a plan to have a member (sic)*

[2] Mr. Briley had authored a memorandum to Putnam County commissioners explaining how they could underrepresent blacks, women, and young people on grand and petit juries. Amadeo, a Putnam County death-sentenced inmate, filed a petition for writ of habeas corpus challenging his conviction based upon this intentional discrimination. The federal district court granted the writ of habeas corpus for Amadeo, finding that Mr. Briley's conduct constituted "intentional racial discrimination." *Amadeo v. Zant*, 486 U.S. 214, 228 (1988). The state did not dispute that Briley had intended to discriminate on the basis of race. The district court also found that Mr. Amadeo's "default" of the claim in state court was excused by "cause," *i.e.*, that the state had concealed its own misconduct. The United States Court of Appeals for the Eleventh Circuit reversed the district court, holding that trial counsel could have discovered the misconduct earlier. This Court reversed, reinstating the district court's grant of relief, finding that the record sufficiently supported the district court's "cause" findings. The *Batson* challenge in Hightower's case occurred on May 2, 1988; counsel quoted from a March 30, 1988, newspaper article about the *Amadeo* argument before the Supreme Court.

> *number of blacks on the grand jury in Putnam County in order to have it just half the jury criteria for grand jury . . . You are well acquainted with that case, Your Honor.* We would say that this is the same circumstances, the same sort of scheme that Mr. Briley was doing in this particular case. He is purposely using his strikes to provide for just the minimum amount of blacks, absolutely the minimum amount . . .

R. 616-617 (emphasis added) (App. E). Most tellingly, Prosecutor Briley did not deny having authored the memorandum, though he disputed its intention, and the trial judge did not deny that he was "well-acquainted with the case." *Id.*

Given *Miller-El II's* treatment of the history of discrimination by the Dallas District Attorney's Office, it cannot be denied that Mr. Hightower presented *some* evidence of discriminatory intent, unless that denial was a rhetorical move rather than a genuine attempt to discern the relevance of *Miller-El II*. As dissenting Judge Wilson pointed out, Mr. Hightower's proffered evidence of prior discrimination was greater than that this Court deemed probative in *Miller-El II*; in *Miller-El II*, there was no evidence of discrimination by the *individuals* who prosecuted Miller-El, whereas Mr. Hightower's prosecutor personally authored a memorandum that spelled out the scheme to limit the number of blacks in the jury pool.

Finally, the *Hightower II* majority's assertion that the trial judge's *silence* on whether the stated reasons for strikes were credible reflected implicit findings that they were, and that such findings required deference, cannot be reconciled with *Miller-El II*. As Mr. Hightower's second petition for writ of certiorari argues, collapsing the second

and third steps of *Batson* is not consistent with *Batson* or any of its progeny, including *Miller-El II*; the specific purpose of the third step is the analysis of credibility, a question that is separate from the determination of whether a race neutral reason has been articulated. As the Court recognized in *Miller-El II*, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false . . . " *Miller-El II* at 240.

Thus, the Eleventh Circuit gave no reason for its refusal to reconsider in light of *Miller-El II* that can be squared with this Court' s opinion in that case.

III. *Miller-El II* Compels the Conclusion That the Reasons Given by Mr. Hightower's Prosecutor Were Pretextual.

Even if the trial court had followed the three-step process laid out in *Batson* and then explicitly stated that it found the prosecutor's reasons credible, *Miller-El II* does not countenance the degree of deference the Eleventh Circuit uncritically accords the trial court. *Miller-El II* did not blindly defer to the trial judge's third-step credibility determination (even thought it was explicit), but instead found "powerful" the "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El II* at 241. Had the Eleventh Circuit looked at side-by-side comparisons as this Court's remand order plainly instructed, it would have had to conclude that at least some of the proffered reasons were pretexts.

Indeed, *following* this Court's order, dissenting Judge Wilson reconsidered in light of *Miller-El II*, made those

comparisons, and concluded that "[t]he record is replete with examples of veniremembers who were struck arguably because of their race, but three strikes are especially troubling, specifically the exercise of peremptory challenges to eliminate Thelma Butler, Ricky Thomas, and Emerson Davis." *Hightower II*, 459 F.3d at 1076 (Wilson, J., dissenting). Judge Wilson first considered – and found wanting – the state's alleged reasons for striking Thelma Butler:

> Briley claims that he struck Thelma Butler because he successfully prosecuted her brother-in-law twelve years prior. He also claims that Butler was somewhat hostile. From the record, it appears that Butler was an ideal juror for a prosecutor seeking the death penalty. Butler felt that people tried for murder are treated too leniently. She was strongly in favor of the death penalty. She felt that mitigating circumstances must be proven before she would consider imposing a life sentence. Her answers alone undermine the veracity of Briley's proffered justification, especially since he never questioned Butler about her brother-in-law. Even more striking is the fact that Briley declined to strike a non-black juror, Michael Hensler, who, himself, had been convicted of and imprisoned for voluntary manslaughter by Briley"s office.

Id. With respect to the second particularly troubling strike, Judge Wilson wrote:

> In another example, Ricky Thomas's father had been convicted of killing his mother. Because of this conviction and the fact that Thomas had lived with his father after his father's release, the prosecutor struck him speculating that Thomas may possibly identify his father's case with

> Hightower's. Yet, Thomas indicated that he was in favor of the death penalty, and that he did not even remember the circumstances surrounding his mother's killing because he was too young at the time. The prosecutor never questioned Thomas about his relationship with his father or the potential impact on his ability to decide the case fairly. Again, the pretext is more apparent when viewed in light of the fact that Hensler was not struck.

459 F.3d at 1076 (Wilson, J., dissenting). The prosecutor's stated reason for striking a third black juror, Emerson Davis was no more convincing:

> Emerson Davis was struck because the prosecutor claimed that Davis was somewhat opposed to the death penalty, more so than other veniremembers. Davis never stated that he was opposed to the death penalty, but rather had to hear the case before imposing the penalty. The prosecutor mischaracterized his voir dire, thereby undermining a claim that the prosecutor's reason was race-neutral. In fact, Davis's views were in line with several non-black jurors whom the prosecutor declined to challenge. If Davis was undesirable as compared to other veniremembers on the question about the death penalty, then the prosecutor would have used his remaining peremptory strikes to eliminate other veniremembers who gave similar answers. However, the non-black veniremembers who gave similar answers were not struck.

459 F.3d at 1076-77 (footnote omitted) (Wilson, J., dissenting). "Viewing the evidence in its totality, including the 'smoking gun' memorandum penned by [Mr. Hightower's

prosecutor], it is clear that [his] proffered justifications were pretextual." *Id.* at 1077.

IV. This Case is "On All Fours" With *Miller-El II* In Its Pernicious Use of Racial Stereotypes.

As Judge Wilson futilely protested, "This case is factually on all fours with *Miller-El.*" *Id.* at 1077. Among the "extensive" factual similarities pointed out by Judge Wilson, *id.*, were that two of the reasons cited by Miller-El's prosecutor were precisely the same reasons proffered by Mr. Hightower's prosecutor:

> In *Miller-El*, the prosecutor struck a black veniremember because the juror was "inclined" to favor rehabilitation, while non-black jurors, who expressed stronger beliefs in favor of rehabilitation, were not struck. Here, Briley struck Davis, a black veniremember, because he was "somewhat opposed to the death penalty" as compared to other veniremembers, but did not strike non-black veniremembers, such as Carter, Shatterly, and others mentioned above, who expressed views similar to Davis's, and in some instances expressed views more equivocal than Davis's. Further, in *Miller-El*, the prosecutor struck from the jury black veniremembers because they had relatives who were prosecuted by the D.A.'s office. The Court noted the prosecutor's failure to inquire into the details of the convictions and relationships as further evidence that the reason was a pretext. Here, Briley struck four black veniremembers because they allegedly had relatives who were prosecuted by the D.A.'s office. Just as in *Miller-El*, Briley did not inquire into the details of these convictions and relationships. Briley also declined to challenge Hensler,

> a non-black juror who *himself* had been prosecuted and convicted of voluntary manslaughter. In *Miller-El*, the prosecutor, while stating the race-neutral reasons for the strikes, mischaracterized the voir dire testimony of some of the black veniremembers he struck. Similarly, Briley mischaracterized the testimony of Davis.

Id. (citations omitted) (internal footnotes omitted).[3]

The striking similarity of both pretextual grounds provides yet another reason for inferring deliberate disobedience on the part of the Eleventh Circuit. Moreover, the content of those proffered reasons has additional significance. Why bias imputed from the criminal history of relatives? Why death penalty attitudes?

The answer lies both in the easy availability of these two pretexts, and in their consistency with racial stereotypes. Many, if not most venirepersons will have *some* relative, however, distant or estranged, who has been prosecuted for *some* crime at *some* time; indeed, this is why comparable white jurors were found in each venire. But it likely comes more quickly to the scrambling prosecutor's mind – and is more quickly accepted by the trial court – because it is consistent with stereotypes of black criminality. *See* Alexander Aleinikiff, "The Constitution in Context: The Continuing Significance of Race," 63 COLO. L. REV. 325, 332 (1992) (reviewing studies); *see also*, Sheri Lynn Johnson, "Racial Imagery in Criminal Cases," 67 TULANE L. REV. 1739, 1751-53 (reviewing prosecutor's

---

[3] Judge Wilson also considered the one significant difference between the two cases, and concluded that "[t]his case is a more factually compelling *Batson* violation than *Miller-El* because of Briley's personal history of past discrimination." *Id.*

arguments calling on stereotypes of black criminality). As social psychologists tell us, "[a]ctions that are consistent with an existing stereotype are more noticed, imbued with significance, and remembered, whereas those at variance with the stereotype may be ignored, dismissed, or quickly forgotten." Gilovich, Keltner, & Nisbett, *Social Psychology* 454 (W.W. Norton & Co. 2006) (reviewing and citing the literature). Thus, prosecutor, defense attorney, and judge are all more likely to remember when an African American juror acknowledged that he or she has a family member with a criminal history than they are to remember when a white juror did so. This makes on-the-spot comparative juror analysis that would reveal pretext especially difficult.

It also makes reliance on such stereotypes especially harmful. Any generalization about an African American juror that is based on race is impermissible, and any prosecutor who strikes a juror based on such a generalization harms both that juror and the defendant. But the injury to the juror (and to the defendant, if he is African American) is greater yet when he or she is assumed to be sympathetic to criminals, or more closely related to criminals, or more hostile to law enforcement, simply on the basis of race. For a prosecutor to perpetuate stereotypes of criminality is reprehensible, and for a judge to ignorantly or indifferently or complacently accept such perpetuation is intolerable.

Likewise, death penalty attitudes are easily available in a death penalty case; the voir dire of virtually every juror explores them. Moreover, while stereotypes of African American opposition to the death penalty are less pernicious than stereotypes of criminality, they are nonetheless stereotypes, and thus reasons related to those

stereotypes are more likely to be accepted as true. Whether or not African Americans *as a group* have more ambivalence about the death penalty is irrelevant; some studies suggest that they may. Nonetheless, for a prosecutor to discriminate against an individual juror based upon stereotypes about the attitudes of the racial group to which he belongs is impermissible, and every judge should be vigilant to guard against slipping into stereotype-consistent interpretations of jurors' responses.

Just as this Court pointed out in *Miller-El II* that the jury shuffle was amenable to use for racially discriminatory purposes, it should specifically instruct lower courts that recitation of stereotypes about African Americans should be viewed with greater suspicion than citation of nonstereotyped characteristics or responses. Any time a prosecutor says that an African American juror has a relative who is a criminal, or asserts that the juror is poorly educated, or on welfare, or lives in a crime-prone neighborhood, or is dumb or inarticulate or hostile or radical, or opposes the death penalty, or mistrusts the police, to name a few, skepticism is warranted.

V. Race-Based Recalcitrance Demands Rebuke and Correction By This Court.

Just as "[i]t blinks reality to deny that the [Texas prosecutor] struck Fields and Warren . . . because they were black," *Miller-El II* at 266, it blinks reality to deny that the Georgia prosecutor struck Thelma Butler, Ricky

Thomas, and Emerson Davis because they were black.[4] Yet, multiple courts have blinked these realities, sometime doing so contrary to the direct instruction of this Court, the Supreme Court of the United States.

Miller-El, *Hightower*, and *Snyder* all stand at the intersection between two factors that may be particularly likely to increase resistance to this Court's rulings: race and capital habeas petitions. In the history of resistance to Supreme Court commands, the most notorious episode of all involves race. Certainly the most widespread, protracted, and violent resistance to this Court's power came in the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), which declared that racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment. In a story so well known it needs no footnotes, this Court stayed its course and insisted on adherence to its commands. After widespread footdragging and intransigence from many school boards across the South, the Governor of Arkansas blocked an integration plan approved by the federal courts in pursuance of *Brown's* mandate. The governor backed off for a brief time, but integration was again halted when the Little Rock school board sought and was granted a long postponement of the desegregation plan. In an opinion signed by all nine justices, this Court rejected that postponement and rejected Arkansas' contention that it was not bound by the *Brown* ruling since it had not been a party to the *Brown* litigation. As this Court forcefully declared, "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the

---

[4] Such recalcitrance is not limited to the Eleventh Circuit. *See* Petition for Certiorari, *Snyder v. Louisiana* (2007) (No. 06-10119).

land," which binds "every state legislator and executive and judicial officer . . . " *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

This Court has also faced recalcitrance in capital habeas cases. More specifically, it has faced recalcitrance from the Eleventh Circuit, and indeed, from a panel similarly composed to the one in Hightower's case. *See, e.g., Burden v. Zant*, 24 F.3d 1298, 1299 (11th Cir. 1994) (Tjoflat, Anderson and Fay, JJ.) (holding after a second remand from this Court, *Burden v. Zant*, 510 U.S. 132 (1994) that "the terms of the [Supreme] Court's most recent mandate compel our conclusion" that the petitioner's counsel labored under a conflict of interest which mandated issuing the writ).

Race-based recalcitrance is particularly dangerous to the Constitution and to this Court. But even if the panel's insubordination stems in part or in whole from the fact that this is a capital habeas case, or from the particular personnel and personalities comprising the panel, it must be rooted out.

CONCLUSION

A prosecutor should not be allowed to hide behind his bare assertion of race-neutrality in the face of a comparative juror analysis that reveals pretext. A circuit court should not be permitted to hide behind its bare assertion that this Court's precedents are inapplicable in the teeth of this Court's remand order directing it to apply those precedents. This Court should grant certiorari and affirm its authority, either by a summary reversal, or by plenary review of the case.

Respectfully submitted,

SHERI LYNN JOHNSON
CORNELL LAW SCHOOL
108 Myron Taylor Hall
Ithaca, NY 14853-4901
(607) 255-6478
slj8@cornell.edu

Attorney for Amicus Curiae